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**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1980**

**No.**

**LAMARR BADONI, et al.,**

***Petitioners,***

**v.**

**R. KEITH HIGGINSON, Commissioner, Water and Power Resources Service, et al.,**

***Respondents.***

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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March, 1981

## QUESTIONS PRESENTED

1. If the Federal Government would otherwise be permitted to take certain actions to mitigate the damage it had inflicted upon a natural landmark, and to regulate public access thereto, so as to accommodate long-standing activities having special significance to a group indigenous to the area, may such actions by the Government be deemed automatically barred by the First Amendment's Establishment Clause for the sole reason that the landmark's significance to the group, and the group's activities at the site, are religious in character?

2. Where the Federal Government expropriated a site having great religious importance to Navajo Indians, and thereafter managed the site in such a way as to prevent the exercise of traditional Navajo religious practices there, may the Indians' claims that the Government is required by

the Free Exercise Clause to take corrective measures to enable such religious practices to resume be summarily dismissed on the ground that governmental accommodation of the Indians' religious needs, in any manner that restricts encroachment by tourists, would violate the First Amendment rights of the latter?

3. May such a rejection by the Executive Branch of Free Exercise claims advanced by Navajo Indians be upheld notwithstanding Congress' clear expression of statutory intent that federal policies and regulations should, wherever possible, respect sites sacred to American Indians and accommodate the religious rites and ceremonies conducted there?

## PARTIES TO THE PROCEEDING

Petitioners herein (appellants below), are Lamarr Badoni, Teddy Holiday, Betty Holiday, Jessie Yazzie Black, Jimmy Goodman

and Begay Bitsinnie, all individual Navajo Indians, and the Navajo Mountain Chapter, the Inscription House Chapter, and the Shonto Chapter of the Navajo Nation. ("Chapters" are communities of the Navajo Reservation, resembling in many respects the town meetings of New England.)

Respondents include the original defendants or their successors, R. Keith Higginson, Commissioner of the Water and Power Resources Services (formerly the Bureau of Reclamation), Russell Dickinson, Director of the National Park Service, and James Watt, Secretary of the Interior, all of whom were sued in their official capacities only; and the intervenors, the State of Utah, Central Utah Water Conservancy District, Colorado River Water Conservancy District, Southwestern Water Conservation District, and the State of Colorado.

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## PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Tenth Circuit herein, for the reasons stated below.

## OPINIONS BELOW

The opinion of the United States District Court for the District of Utah, dated Dec. 30, 1977, granting summary judgment to defendants and intervenor-defendants (respondents herein) is set forth at App. A-1 of the Appendix to this petition, and is reported at 455 F.Supp. 641 (D. Utah 1977). The opinion of the United States Court of Appeals for the Tenth Circuit, dated November 3, 1980, affirming the judgment below, is set forth at App. A-36 of the Appendix to this petition, and is unreported as yet. The order of the Court of Appeals denying petitioners'

Petition for Rehearing and Suggestion for Rehearing En Banc is set forth at App. A-67.

## JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1980. A timely petition for rehearing was denied on December 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or probhiting the free exercise thereof; ..."

American Indian Religious Freedom Act, Pub.L. 95-341, 92 Stat. 469 (1978)(codified in part at 42 U.S.C. §1996):

"Whereas the freedom of religion for all people is an inherent right, fundamental to the democratic structure of the United States and is guaranteed by the First Amendment of the United States Constitution;

"Whereas the United States has traditionally rejected the concept of a government denying individuals the right to practice their religion and, as a result, has benefited from a rich variety of religious heritages in this country;

"Whereas the religious practices of the American Indian (as well as Native Alaskan and Hawaiian) are an integral part of their culture, tradition and heritage, such practices forming the basis of Indian identity and value systems;

"Whereas the traditional American Indian religions, as an integral part of Indian life, are indispensable and irreplaceable;

"Whereas the lack of a clear, comprehensive and consistent Federal policy has often resulted in the abridgement of religious freedom for traditional American Indians;

"Whereas such religious infringements result from the lack of knowledge or the insensitive and inflexible enforcement of Federal policies and regulations premised on a variety of laws;

"Whereas such laws were designed for such worthwhile purposes as conservation and preservation of natural species and resources but were never intended to relate to Indian religious practices and, therefore, were passed without consideration of

their effect on traditional American Indian religions;

"Whereas such laws and policies often deny American Indians access to sacred sites required in their religions, including cemeteries;

"Whereas such laws at times prohibit the use and possession of sacred objects necessary to the exercise of religious rites and ceremonies;

"Whereas traditional American Indian ceremonies have been intruded upon, interfered with, and in a few instances, banned: Now, therefore, be it

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the tradi-

tional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

"Sec. 2. The President shall direct the various Federal departments, agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices. Twelve months after approval of this resolution, the President shall report back to the Congress the results of his evaluation, including any changes which were made in administrative policies and procedures, and any recommendations he may have for legislative action."

16 U.S.C. §1:

"There is created in the Department of the Interior a service to be called the National Park Service ... [to] promote and regulate the use of the ... national parks, monuments, and reservations ... to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

## STATEMENT OF THE CASE

### A. Introduction

As this Court said in Roemer v. Board of Public Works, 426 U.S. 736 747 (1976), a church can surely "be protected by the police and fire departments, [and] have its public sidewalk kept in repair." Public authorities routinely protect religious

shrines from desecration without any suggestion that they thereby run afoul of the Establishment Clause. A cathedral no less than a chemical plant or a cultural monument may be protected at public expense from destruction and invasion. So, too, a natural formation that one group worships as holy, no less than a wilderness area that another admires as a scientific wonder, may be protected at public expense from damage and intrusion.

Even if the validity of such action were otherwise in doubt, it should be beyond dispute where it was previous action by the Federal Government itself that threatened a religion's hallowed ground with destruction and the religion's rituals with extinction. At least in such a case, government measures that would have been impermissible where the significance of the sites and the character of the observance were wholly secular surely do not become

forbidden establishments of religion solely becuase the site in question is not merely revered but worshiped.

Yet this is precisely what the Government argued, and the Court of Appeals held, in the decision that Petitioners urge this Court to review on certiorari. Having all but destroyed a natural cathedral in the desert -- a majestic rock formation in southern Utah long regarded as a god by the Navajo -- the Government successfully evaded any ruling on Petitioners' Free Exercise allegations by interposing the Establishment Clause as a complete defense to the Navajos' pleas -- ultimately embodied in a federal civil action -- that at least marginal steps be taken to prevent this government-initiated abrigement of religious exercise from becoming absolute. If undertaken in the name of ecology, aesthetics, or economic gain, the very measures at issue here, including more

stringent restrictions on the tourists that the Government has brought to the site, would be entirely lawful. But the court below reasoned that, simply because the motives of the Navajo are undeniably religious, the Government is not only relieved of any obligation to minimize the harm that it has caused, but is indeed prevented from doing so -- and prevented, of all things, by the Religion Clauses of the First Amendment.

It is difficult to imagine a more striking inversion of the enduring principles for which the Religion Clauses have always stood. No doubt some governmental actions that gratuitously facilitate or advance a religious enterprise violate the Establishment Clause. But it turns the First Amendment completely on its head to hold, as the Court of Appeals did here, that the Establishment Clause prevents the Government from tailoring its activities

in otherwise unobjectionable ways -- and in ways it might well have employed in this very case if religion had not been involved -- so as to minimize the Government's own positive inroads upon practices protected by the Free Exercise Clause. Not even the advocates of total neutrality under the Religion Clauses -- those who view ours as a religion-blind Constitution rather than a Constitution that tolerates some special accommodations to religion and mandates others -- could endorse the principle implicit in the holding below, which actually places religion in a disfavored position.

B. Factual Setting[1]

For more than a century, bands of

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1/ The facts regarding the religious practices and beliefs of the Petitioners and the claimed infringement of such practices and beliefs by federal action are undisputed, and are derived from the complaint, Petitioners' responses to interrogatories, and the affidavit and manuscript of Petitioners' expert.

Navajo Indians have lived in a rugged and remote region of labyrinthine sandstone canyons on the slope of Navajo Mountain, in the northwestern corner of the vast Navajo Indian Reservation. In the remarkable rock formations and intimate springs and seeps of this fantastic landscape reside the many gods whom the Navajo call upon in complex religious ceremonies, to render the protection and assistance that these gods alone are capable of bestowing. Among the many specific sites these Navajo recognize as especially holy, two are preeminent: "Head of Earth" (as the Navajo call Navajo Mountain itself), and the soaring sandstone arch now known as Rainbow Bridge.

A singular accomplishment of nature, Rainbow Bridge stands 309 feet high and reaches 258 feet across a deep, winding canyon of astounding beauty. To the Navajo, the arch is itself a god, invoked with

reverence in numerous ceremonies as a source of protection and bringer of rain. One such ceremony that is central to the rain-bringing rituals of this region can be performed only at the arch. And medicinemen have often made the arduous trip through the tortuous canyons of the region solely to collect the sacred waters from particular springs near the arch, to be used for other ceremonial purposes elsewhere.

In 1910, following the "discovery" of Rainbow Bridge by a group of white explorers, President William Howard Taft proclaimed a 160-acre tract including the arch to be Rainbow Bridge National Monument. Nevertheless, for the next half-century very few whites saw the arch, so isolated was Bridge Canyon from the non-Indian world. And the profound Navajo religious beliefs concerning the arch remained virtually unknown beyond the Navajo

Mountain area.[2] But the completion, in 1963, of Glen Canyon Dam on the Colorado River, under the provisions of the Colorado River Storage Project Act of 1956, 43 U.S.C. §620, and the consequent creation of Lake Powell behind the dam, backing water up under Rainbow Bridge itself, made possible tourist visitation to Rainbow Bridge on a large scale.[3] The National Park Service, which operates Rainbow Bridge

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2/ In the District Court, Petitioners herein submitted the affidavit of Dr. Karl Luckert, an expert in Navajo religion and ceremonialism, together with a manuscript authored by him, entitled Navajo Mountain and Rainbow Bridge Religion, a study that was subsequently published by the prestigious Museum of Northern Arizona. Because of its unique value and direct bearing on the issues raised by this case, 10 copies of the published volume (whose text is identical to the manuscript submitted to the District Court) have been lodged with the Clerk of the Court as Exhibit A to this Petition.

3/ Interrogatory responses by the Park Service revealed that from 1909 through 1962, a total of 23,890 tourists visited Rainbow Bridge. In 1975 alone, visitation exceeded 65,000.

National Monument and the Glen Canyon National Recreation Area (which includes Lake Powell and adjacent land), has taken various steps deliberately to promote such tourism, including installing a floating dock at the Bridge; licensing tour boats, which bring large numbers of tourists to the Bridge each day; permitting the stationing of a large floating marina just downstream from the Bridge;[4] and generally touting the Bridge as a major attraction of Lake Powell, itself a primary recreation spot for the entire Southwest.

All of these actions have had cumulatively severe impact on the religious practices and beliefs of traditional Navajos, including the Petitioners and the

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4/ The Court of Appeals noted the assertion in the Government's brief that the marina had been moved. App. A-40, n.2. In fact, although the Government has said that it intends to move the marina, the marina was still in place as recently as March 5, 1981.

persons they represent. The construction of the dam and the consequent flooding of Bridge Canyon have caused the destruction of sites of major religious significance and the drowning of the gods who resided there. And those actions, with the others listed above, have caused an enormous influx of non-Indian tourists into the area, resulting in direct interference with Navajo religious ceremonies as well as desecration of other sites of importance. Interrogatory responses filed by Petitioners in the District Court showed several specific instances in which Navajo ceremonies were halted or had to be started over because of the intrusion of tourists, and other occasions on which the presence of large crowds of tourists at the Bridge discouraged the medicinemen from even attempting to perform their rituals.

As Dr. Karl Luckert, Petitioners' expert, noted in his affidavit, traditional

Navajo religion depends upon the esoteric knowledge of priestly singers, or medicine-men, who call upon the powers of divine beings in the natural world through elaborate, semi-private rituals. For the Navajo priestly singers, the federal actions complained of here have struck at the heart of Navajo religious beliefs, have severely impaired the utility of important ceremonies, have prevented others from being held, and have hastened the time when this living body of traditional belief will be but a distant memory.

It was to seek recognition of their right to the continued exercise of their age-old religious practices and beliefs, and to lessen the profound disintegration of those practices and beliefs caused by the flooding of Bridge Canyon by Lake Powell and by the desecration of the remaining sacred areas and rituals by Government-encouraged tourism, that the Petition-

ers initiated this action.

C. Course of the Litigation

Petitioners (six individual Navajo Indians, three of whom are "medicinemen," religious leaders and healers,[5] and three "chapters," or communities of Navajo people, each of which consists of several hundred adult Navajo Indians) filed this action in 1974, in the United States District Court for the District of Utah. Petitioners alleged that the various federal actions discussed above with respect to Rainbow Bridge National Monument, Glen Canyon National Recreation Area, and Glen Canyon Dam, had severely and directly impaired their religious practices and beliefs pertaining to Rainbow Bridge and its vicinity, contrary to the Free Exer-

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5/ Two other medicinemen originally named as plaintiffs, Nakai Dit1'oi and Joe Manygoats, died during the course of the litigation.

cise Clause of the First Amendment. Petitioners accordingly sought appropriate declaratory and injunctive relief to minimize the infringement complained of.[6] Jurisdiction was based upon 28 U.S.C. §§1331, 1332, and 1361, and 5 U.S.C. §§701-706.

Petitioners did not specify in their complaint the precise relief they sought, asking only for such relief as the District Court deemed appropriate in light of the rights infringed and the alternatives available. Petitioners believed, and asserted below, that a spectrum of remedies was conceivable -- from lowering the level of Lake Powell to numerous far less severe steps to control and limit tourist activity at the Monument. The District Court, however, never reached the point of

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6/ Two other claims originally alleged in Petitioner's complaint have since been abandoned or have become moot.

considering any specific relief. Instead, it simply granted Respondents' motions for summary judgment, holding first that, since Petitioners had no "property interest" in Rainbow Bridge, they could maintain no Free Exercise claims as to it; and second, that Petitioners' religious practices and beliefs could not possibly be weighty enough to overcome the Federal Government's interest in the operation of Glen Canyon Dam. Despite Petitioners' contentions to the contrary, the District Court treated the lowering of the Lake as the only relief material to Petitioners' claims. App. A-20-23.[7]

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7/ From the outset of the litigation, Petitioners had urged the District Court to consider remedies besides lowering the Lake. The Court took note of some of the available options in a pre-trial order entered on October 26, 1976, reporting on efforts to arrive at a settlement of the litigation, and Petitioners' memorandum in opposition to Respondents' motions for summary judgment noted, at pp. 7-8, that while lowering the Lake would repair virtually the entire injury, "[o]ther, less

On Petitioners' appeal, the Court of Appeals properly rejected the District Court's ruling that lack of a property interest barred Petitioners' Free Exercise claims, see Sequoyah v. T.V.A., 620 F.2d 1159, 1164 (6th Cir. 1980), cert. denied, 49 U.S.L.W. 3332 (1980), App. A-43, but it agreed that the federal interest in maintaining the designed level of Lake Powell outweighed any religious interests Petitioners might assert. App. A-47. In response to Petitioners' further argument

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7/ (cont.) drastic measures are available." The point was reiterated and expanded at oral argument.

Respondents, however, consistently characterized the suit in the District Court as one seeking only a court-ordered decline in the Lake's level. Such characterization obviously made their arguments more palatable, since the burden on Petitioners to establish an entitlement to such relief would be enormous. And when, on appeal, Petitioners claimed error in the District Court's refusal to consider lesser measures, the Respondents somewhat disingenuously professed surprise at this "change" in the Petitioners' case. Brief of Federal Appellees at 11.

that the District Court erred in failing to consider lesser measures that would mitigate the infringements complained of, the Court of Appeals cursorily examined a few such measures suggested in Petitioners' brief, but made no effort to consider the range of possible measures -- despite Petitioners' suggestion that the case be remanded for just that purpose. For the Court of Appeals was of the view that protecting the sites and practices Petitioners deemed sacred by restricting in any degree "the public['s] ... normal use of [the] area," App. A-54, would automatically offend the First Amendment rights of tourists to visit the Monument, inasmuch as <u>any</u> policing of tourist activity to accommodate religion as such would make "the Monument ... a government-managed religious shrine," in violation of the Establishment Clause.

App. A-57.[8] Having thus determined that "no basis for relief" was shown in the record, the Court of Appeals affirmed the dismissal of the complaint without actually examining Petitioners' claim of infringement.

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8/ In light of this unmistakable premise of the Court of Appeals' holding, and the procedural posture of this case -- in which Petitioners have been prevented from adducing proof of the insufficiency of various theoretically available protections mentioned by the Court of Appeals -- the breadth of the decision below is in no degree mitigated by the opinion's passing reference to Park Service regulations supposedly protecting the Monument from certain tourist-imposed damage or permitting the issuance of public assembly permits for after-hours religious ceremonies at Rainbow Bridge, App. A-56-57. These regulations, which were never addressed at the District Court level, are transparently inadequate on their face to offset in any significant degree the abridgment of which Petitioners complain; have been neither shown nor alleged to represent actual practices by Respondents at Rainbow Bridge; and leave completely untouched the facts, accepted by the Court of Appeals in reviewing the summary judgment entered against Petitioners, that "[t]ourists visiting the sacred area have desecrated it by noise, litter and defacement of the Bridge," and that "[b]ecause of ... the presence of tourists [Petitioners] no longer hold ceremonies in the area of the Bridge." App. A- .

## REASONS FOR GRANTING THE WRIT

### I. THE COURT OF APPEALS' HOLDING MANDATES A DEGREE OF GOVERNMENT HOSTILITY TOWARD RELIGION THAT CONFLICTS WITH VIRTUALLY EVERY DECISION OF THIS COURT UNDER THE RELIGION CLAUSES.

Although the question of appropriate relief was never addressed in the District Court, that issue became the basis for the Court of Appeals' decision herein.[9] The Court of Appeals' analysis of that issue runs roughshod over the painstaking efforts by this Court to delineate the ways in which government may act without impermissibly burdening one person's religion or favoring another's.

The Court of Appeals was faced with a record that showed direct and substantial

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9/ Decisions of this Court have held it to be error to determine an appeal on grounds not considered by the court or parties below. Singleton v. Wulff, 428 U.S. 106, 120-121 (1976); Hormel v. Helvering, 312 U.S. 552, 556 (1941). The judgment below could properly be reversed and remanded on this basis alone.

impairment of traditional religious practices, brought about by a series of government actions.[10] Rarely in this century have courts faced such palpable Free Exercise violations. Petitioners had suggested that various measures involving limitations on tourist activity at the Monument -- all of which measures fell far short of lowering the level of Lake Powell -- could and should be considered.[11] Among the measures mentioned in a pre-trial order in the District Court and in Petitioners' brief in

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10/ The decision below appears to place some weight on the fact that tourists, not the government, were immediately responsible for the interference with ceremonies and defacement of sites. App. A-52. But the record is clear that it was government action which facilitated and encouraged the heavy tourist use of the Monument. Cf. NAACP v. Alabama, 357 U.S. 449, 463 (1958).

11/ Actually lowering the level of Lake Powell, while entirely effective to remedy Petitioners' complaints, was a form of relief that both the District Court and the Court of Appeals firmly rejected. App. A-23, A-48. Cf. Friends of the Earth v. Armstrong, 485 F.2d 1 (10th Cir. 1973), cert. denied, 414 U.S. 1171 (1974).

the Court of Appeals were occasionally closing the Monument to allow ceremonies to be held, prohibiting the use of alcohol and other sacrilegious activity, moving the floating marina,[12] and more strictly limiting tourist visitation. None of these actions, or others that may readily be imagined,[13] is even arguably beyond the lawful power of the Respondents.[14] Yet

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12/ See, n.4, supra.

13/ Another step that might have been considered and that would surely be addressed at trial were the judgment below to be reversed with directions to remand to the District Court, is removal of the floating dock at the Monument. Such a "passive" control measure would allow tourists to view the arch from their boats but would prevent most from landing, thereby ending the great bulk of tourist-related interference experienced by Navajo medicinemen.

14/ Indeed, the record shows that, when a rockfall occurred recently near the Bridge, the Monument was closed to all tourists within an hour and remained closed for two days. Depo. of Temple Reynolds, pp. 40-41. The Park Service has been considering plans to move the marina for its own reasons. Id., at 31-33; Order entered Oct. 26, 1976, at para. 2. And as the

solely because these steps, if taken for the purpose of alleviating the infringement of Petitioners' Free Exercise Rights, would necessarily aid Petitioners in the practice of their religion, the Court of Appeals regarded all such relief as foreclosed.

Such excessive zeal in guarding against governmental sectarianism has often been rejected by this Court, beginning in Terrett v. Taylor, 13 U.S. (9 Cranch) 43 (1815) (ban on taking of private property for non-public use applies with full force when property taken belongs to church and persons benefitted are the poor or the parish), even in situations where there was no apparent Free Exercise abrigement that mandated corrective governmental

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14/(cont.) Court of appeals noted, the Park Service has broad power to regulate tourist activity so as to leave parks and monuments unimpaired for future generations. 16 U.S.C. §1, App. A-53.

action. See, e.g., Everson v. Board of Education, 330 U.S. 1 (1947) (state may reimburse church-school students for transportation expenses); Board of Education v. Allen, 392 U.S. 236 (1968) (state may supply textbooks to church-school students); Zorach v. Clauson, 343 U.S. 306 (1952) (state may accommodate public school curriculum to religious needs by releasing students for religious education during school hours); Tilton v. Richardson, 403 U.S. 672 (1971) (government may grant funds to religious colleges for capital improvements); Roemer v. Board of Public Works, 426 U.S. 736 (1976) (state may provide financial assistance to religious colleges). And where Free Exercise concerns have been even indirectly implicated, this Court has not hesitated to approve, and sometimes even to require, extraordinary treatment of religious groups to avoid unduly burdening their beliefs or unduly inhibiting their religious

practices. See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish children must be exempted from secondary education to avoid secular influences imcompatible with their parents' faith); Walz v. Tax Commission, 397 U.S. 664 (1970) (state may exempt religious property from taxation where other charitable uses are similarly exempt); Sherbert v. Verner, 374 U.S. 398 (1963) (state must pay unemployment benefits to Jehovah's Witness who refused on religious grounds to accept jobs requiring Saturday work).

In the instant case, no otherwise unlawful or even extraordinary steps are sought, and the Free Exercise interest is undeniably of enormous magnitude. Under such circumstances, to hold that the Government may not be ordered to lessen the burden that the Government itself has imposed upon Petitioners' religion -- even when the very actions urged as means to

this end could be, often are, and might here have been, taken by the Government for wilderness protection or landmark preservation purposes if urged by other than religious groups acting out of non-religious motives -- twists the Religion Clauses beyond recognition.[15]

Among the implications of such a holding is an invitation to government oppression of religion, and a bar to any rectification of government-caused injuries to religious interests. For whenever government action has directly impaired religious practices, any corrective response will, by definition, aid the religion impaired. But if "hostility, not neutrality, would characterize ... denial of the temporary use of

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15/ Cf. Hunter v. Erickson, 393 U.S. 385, 391 (1969) (equal protection clause precludes interposing barriers to enactment of property regulations for fair housing purposes where no similar barriers inhibit enactment of property regulations for environmental or other purposes unrelated to race or religion). See also, n.19, infra.

an empty public building to a congregation whose place of worship has been destroyed by [natural] flood," Abington School District v. Schempp, 374 U.S. 203, 299 (1963) (Brennan, J., concurring), a most decided hostility would mark an insistence on importing tourists to overrun public lands whose availability for worship has been all but destroyed by a flood of Government's own making. Under the decision below, the more direct and substantial the Free Exercise violation, the more impotent is a court to grant relief. And if measures to aid religion are precluded when the Government has actually impaired religious practices, how may Government justify such comparatively gratuitous gestures as extending its fire, police, parking, traffic, or liquor regulations to churches and their environs? Cf. Gallagher v. Crown Kosher Super Market, 366 U.S. 617, 627 (1961).

The Establishment Clause is frequently

raised as a defense to Free Exercise claims. See, e.g., Sherbert v. Verner, 374 U.S., supra, at 409-410. The decision below demonstrates, perhaps as well as any can, the dangerous consequences of allowing such a defense to swallow up the freedom that both Religion Clauses were ultimately meant to foster. Cf. McDaniel v. Paty, 453 U.S. 618 (1978) (goals of preventing church-state entanglement and religious establishment do not justify abridging religious freedom by excluding clergy from lawmaking process). Whatever limits upon extraordinary governmental accommodation of religion this Court might eventually impose in the service of anti-establishment and equal protection norms, this case presents the Court with an important opportunity to address the circumstances in which the Federal Government may and indeed must extend entirely ordinary protection to religious sects who have been oppressed by

the Government's own acts -- where failing to extend such protection would evidence not neutrality but hostility toward religion. The clarity with which this critical question is presented here makes the instant case unusually appropriate for review.

## II. THE DECISION BELOW RAISES NOVEL AND IMPORTANT QUESTIONS OF THE INTERPLAY BETWEEN THE RELIGION CLAUSES AND THE MANAGEMENT OF PUBLIC LANDS.

This Court and several Courts of Appeals have held that the government may not prevent religious groups from conducting peaceful religious observances on public property, including public parks, and that merely accommodating such observances, without subsidizing them or giving them uniquely favored treatment, does not violate the Establishment Clause. See, e.g., Fowler v. Rhode Island, 345 U.S. 67 (1953); Niemotko v. Maryland, 340 U.S. 268 (1951); O'Hair v. Andrus, 613 F.2d 931, 937 (D.C. Cir. 1979). In the cited cases, the desires of religious

groups to hold their services at the sites in question were motivated at least in part by the public nature of the places involved, but more traditional sanctuaries were no doubt available in each instance. Here, however, no alternative sanctuary could possibly serve as a substitute, and the designation of Rainbow Bridge as a public park -- indeed, a national monument -- is an obstacle, not an inducement, to the religious observances of the traditional Navajo medicinemen whose ancestors worshiped there without governmental interference. The arch itself has long been, and remains to this day, an object of worship. The rituals require privacy and solemnity for the efficacious communications with the spirit world that is their goal -- hardly an ambience compatible with the boisterous activity of tourists enjoying powerboat vacations with governmental blessing, encouragement and even direct

assistance. Thus Petitioners' Free Exercise claim reaches this Court with considerably greater urgency than in the typical "public park prayer" context.

The Court of Appeals nonetheless experienced difficulty with any notion that the Government might be required, or even permitted, to control the flow and conduct of tourists out of respect for Petitioners' religious beliefs;[16] its concern was that

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16/ The opinion below in fact shows extraordinary solicitude for tourists, deeming their "right" to visit Rainbow Bridge without restraint itself to be of constutional dimension. Relying on such cases as Hague v. C.I.O., 307 U.S. 496, 515 (1939); Shuttlesworth v. Birmingham, 394 U.S. 147, 152 (1969); Cox v. Louisiana, 379 U.S. 536, 554, 555 (1965); and others, the Court of Appeals held that Petitioners' complaints that they have been prevented from engaging in their religious practices could not justify interference with the "right" of the public to visit Rainbow Bridge without restriction. App. A-54-56 But each of those cases held that the interest of the public at large in utiliing public places must yield to the exercise of legitimate and sincere First Amendment rights (including those under the Free Exercise Clause, as in Niemotko v. Maryland).

"the monument would [otherwise] become a government-managed religious shrine." App. A-57. But the whole point is that Rainbow Bridge is a religious shrine; it was that long before it was declared to be a national monument. And, although Rainbow Bridge is government-managed, it has lost none of its sacred character to the Navajo -- despite the oppressive effects of the actions that the Federal Government has taken there. One doubts that the Government would claim that it could declare the Mormon Temple to be a national monument and

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16/(cont.) The Court of Appeals' decision opens the door to the very kind of mob suppression of First Amendment rights that this Court condemned in Cox v. Louisiana, 379 U.S. at 551.

Old North Church in Boston is of great historical importance and interest to the nation, but surely tourists have no right to prevent the congregation from holding its Sunday services there, defended by local police from trespass and noise, simply because the Government has declared the building to be a national shrine. Yet, if the decision below stands, not even that obvious proposition is secure.

proceed to manage both it and the immediately adjacent public streets and parks so as to prevent the congregation from worshiping there. Cf. Terrett v. Taylor, supra. Yet the Navajo have suffered just such an injustice here, and the decision of the Court of Appeals gives the Government's sacrilege constitutional immunity.

While this case was pending in the Court of Appeals, Congress enacted the American Indian Religious Freedom Act, Pub. L. 95-341, 92 Stat. 469 (1978), reminding every federal agency that otherwise lawful land management actions might impinge impermissibly upon the Free Exercise rights of Native Americans who revere sites now considered to be public land. Enacted in the exercise of Congress' unique ficuciary relationship with the Indian people, see, e.g., Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), the Act mandates a policy of precisely such sensitivity to and accom-

modation of traditional Indian religions as Petitioners have urged in this case. The Court of Appeals' only reference to the Act was its terse observation that "we do not have before us [its] constitutionality." App. A-60. Although harsh, this suggestion -- that any accommodation to the traditional practices and needs of American Indians in consideration of their religious beliefs and rituals on the public lands would be of doubtful constitutionality -- is fully consistent with the rest of the opinion below, which casts a cloud of constitutional doubt over numerous other actions by Congress prompted by similar concerns. For example, Pub.L. 91-550, 84 Stat. 1437 (1970), returned to the Taos Indian Pueblo its sacred Blue Lake and surrounding lands for religious purposes; 25 U.S.C. §§640d-19 and 640d-20 (1974), guarantee Hopi Indians access to sacred sites located on the Navajo Indian Reservation; 16 U.S.C. §228i(c)

ensures the Havasupai Indians access to sacred sites located in Grand Canyon National Park; and 16 U.S.C. §668(a), which provides for the criminal prosecution of all persons who possess eagle feathers, exempts Indians who have such feathers for religious purposes. Moreover, various federal agencies, including Respondents herein, have promulgated regulations and policies with similar objectives; 21 CFR §1307.31 provides for the exemption from criminal prosecution of Indians who use peyote, a controlled substance, for religious purposes; and the Colorado River Management Plan prohibits public access at all times to specified Hopi Indian sacred sites located in Grand Canyon National Park. U.S. Department of Interior, Colorado River Management Plan, at Appendix A-5 (December, 1979).

Nor is such federal protection accorded only to Indian religious beliefs. Congress

has provided exemptions for individuals from paying Social Security taxes, 26 U.S.C. §1402(e) and (g) (1968), and from serving in the armed forces, 50 U.S.C. App. §456(j) (1967), see, Welsh v. United States, 398 U.S. 333 (1970); Id. at 369-371 (White, J., joined by Burger, C.J., and Stewart, J., dissenting), where doing otherwise would conflict with the dictates of an individual's religion. Congress has also provided for compensatory time off for religious observances so that government employees may practice their religions without interference. 5 U.S.C. §5550(a) (1979). And sectarian religious services are regularly held at privately owned churches now designated as national historical sites and operated by Respondent National Park Service.[17] Indeed, Respondent

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17/ Among these are such famous churches as the Christ (Old North) Church, Boston, Massachusetts; Gloria Dei (Old Swedes)

Park Service itself owns and operates churches at many national parks for the convenience of visitors.[18]

If the decision of the Court of Appeals remains undisturbed by this Court, these Acts of Congress, federal regulations, and federal policies, as well as many other similar laws, regulations, policies and practices at all levels of government -- all of which protect Americans of every religious persuasion in the practice of their respective faiths -- are in jeopardy of being overturned. This Court should announce its unwillingness to countenance any such result.

The principle of governmental neutrality in matters affecting religion cannot

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17/(cont.) Church and St. Joseph's Roman Catholic Church, both in Philadelphia, Pennsylvania.

18/ Examples include the Shrine of the Ages Chapel, Grand Canyon National Park; Yellowstone National Park Chapel; and Yosemite National Park Chapel.

mean that religion must always fend for itself, no matter how harshly the actions of Government may oppress religious life. The Religion Clauses enact neither the Law of the Jungle nor the Bureaucratic Imperative. Yet the Court of Appeals has consigned Petitioners, and all others whose religious practices necessarily involve lands over which the government asserts plenary authority, to a hopeless struggle with the federal land managers and bureaucrats, who under the decision below must act in total disregard of all religious concerns, and may do nothing -- voluntarily or under court order[19] -- even to repair

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19/ Although it may be that some permissible accommodations of religion are not constitutionally compelled, the Establishment Clause could not be said to bar an accommodation when ordered by a federal court if the same accommodation would be allowed when voluntarily chosen by Congress or the Executive Branch. For the First Amendment, which commands "Congress [to] make no law respecting an establishment of religion," certainly restricts the Judicial

the damage caused by such mandated indifference.

## CONCLUSION

Petitioners have suffered direct and serious impairment of their religion at government hands. In the courts below, they sought some measure of accommodation of their beliefs, not different in kind from that typically accorded more orthodox

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19/(cont.) Branch no more than it does the Legislative or the Executive. And judicially mandated relief is, if anything, the most appropriate form of remedial action, not the least. Cf. Fullilove v. Klutznick, 100 S. Ct. 2758, 2799, n.4, 2800 (1980) (Stewart, J., dissenting); University of California Regents v. Bakke, 438 U.S. 265, 300-01 (1978) (Powell, J., announcing judgment); Id. at 364 (Brennan, J., joined by White, Marshall, and Blackmun, JJ.). Thus the Court of Appeals could not have suggested, and did not hold, that the Establishment Clause, which it invoked as a bar to court-ordered adoption of the remedies Petitioners sought below, might leave Congress or the Executive free to adopt such remedies in voluntary response to Petitioners' pleas. The present case therefore squarely presents the question whether even voluntary accommodation is ruled out by the Establishment Clause.

faiths, although seemingly unusual due to the distinct nature of Petitioners' religion. There are remedies available both modest and feasible that would substantially lessen the burdens on Petitioners' religion. Yet Petitioners have never received a factual hearing on their claim that the abridgement of their religious freedom is both needlessly severe and constitutionally avoidable. The decision of the court below, if allowed to stand, insures that the continued impairment of the beliefs and practices of Petitioners and others like them will never be remedied. For the holding of the Court of Appeals gravely jeopardizes the spirit of benevolent neutrality that until now has characterized this Nation's stance towards diverse religious creeds.

Particularly in light of this Court's recent determination to review the upper and lower limits of state accommodation to

religion in managing the facilities of public higher education, Chess v. Widmar, 635 F.2d 1310 (8th Cir. 1980), cert. granted sub nom. Widmar v. Vincent, 49 U.S.L.W. 3617 (No. 80-689); in regulating public forums, Heffron v. ISKCON, Inc., 299 N.W.2d 79 (Minn. 1980), cert. granted, 49 U.S.L.W. 3515 (No. 80-795); and in allocating government unemployment benefits, Thomas v. Review Board, 391 N.W.2d 1127 (Ind. 1979), cert. granted, 444 U.S. 1070 (No. 79-952), it would seem sensible similarly to invite plenary briefing and argument on the merits of the ruling below -- a ruling which astonishingly mandates a disfavored position for religion and religious values in the Federal Government's management of natural and historic resources.[20]

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20/ At the very least, Petitioners respectfully submit that this Petition should be held for disposition in light of Widmar, Heffron, and Thomas.

Respectfully submitted,

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Lamarr BADONI, Teddy Holiday, Betty Holiday, Jessie Yazzie Black, Jimmy Goodman, Begay Bitsinnie, Shonto Chapter of the Navajo Nation, Navajo Mountain Chapter of the Navajo Nation, and Inscription House Chapter of the Navajo Nation, Plaintiffs,

v.

R. Keith HIGGINSON, Commissioner, Bureau of Reclamation; Ronald H. Walker, Director, National Park Service; Cecil V. Andrus, Secretary of the Interior, Defendants,

and

State of Utah, Central Utah Water Conservancy District, Colorado River Water Conservation District, Southwestern Water Conservation District, and State of Colorado, Defendants in Intervention.

No. C-74-275

United States District Court,
D. Utah, C.D.

Dec. 30, 1977

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

ALDON J. ANDERSON, Chief Judge

The instant action was commenced on September 3, 1974, by eight individual Navajo Indians and by three Navajo "Chapters." The Navajo "Chapters" are local organizations of the Navajo Nation, each consisting of all the adult members of its respective communities. One of the original eight individual plaintiffs has died, and one has been dismissed from the action. Three of the individual plaintiffs are qualified and recognized among their people as medicine men-i.e., religious leaders of considerable stature among the Navajo, learned in Navajo history, mythology and culture, and practitioners of traditional rites and ceremonies of ancient origin. The remaining three individuals are enrolled members

of the Navajo Tribe of Indians and reside in the general area of Rainbow Bridge National Monument in Southern Utah.

The original party defendants are various officials within the United States Department of the Interior. On February 26, 1975, this court granted the motions of the Colorado River Water Conservation District, the Southwestern Water District, the State of Colorado, the State of Utah, and the Central Utah Water Conservancy District to intervene as defendants.

In their amended complaint, plaintiffs state that under certain operating criteria promulgated by defendant Andrus or his predecessor, the waters of Lake Powell are encroaching upon the Rainbow Bridge National Monument, and that defendants Higginson and Walker have licensed several persons and corporations to operate tour boats on Lake Powell, several

of which make daily trips to Rainbow Bridge, and have in other ways facilitated the development of tourism in the Monument area. Against this background, plaintiffs assert three claims for relief: First, that the flooding of the Rainbow Bridge National Monument has resulted in the destruction and desecration of many Navajo gods and sacred areas in the vicinity and has thereby violated plaintiffs' right to the free and uninhibited exercise of their religious beliefs and practices, as guaranteed by the First Amendment; second, that defendants have violated and are violating section 1 of the Colorado River Storage Project Act which provides that defendants "...shall take adequate protective measures to preclude impairment of Rainbow Bridge National Monument", and third, that defendants' operation of the Glen Canyon Dam and Reservoir is a continuing major

federal action that significantly affects the quality of the human environment, within the meaning of the National Environmental Policy Act (NEPA) and that defendants have not filed the required environmental impact statement concerning their actions. To remedy the situation, plaintiffs ask that this court issue a permanent injunction against defendants, ordering them to take actions to preclude the impairment of the Rainbow Bridge National Monument and the surrounding Glen Canyon National Recreation Area and plaintiffs' interest therein, and to cease further major actions with respect to the operation of the dam and reservoir until the required environmental impact statement is completed.

On various grounds that are discussed below, the following defendants filed properly supported motions for summary

judgment: On February 25, 1977, defendant-intervenors State of Utah and Central Utah Water Conservancy District; and on February 28, 1977, the original federal defendants and defendant-intervenors Colorado River Water Conservation District and Southwestern Water Conservation District. On February 28, 1977, defendant-intervenor State of Colorado filed alternative motions under Rule 12(c) and Rule 12(d), Federal Rules of Civil Procedure. Because matters outside the pleadings have been presented to and not excluded by the court, the court will treat the State of Colorado's Rule 12(c) motion for judgment on the pleadings as one for summary judgment. On May 23, 1977, plaintiffs filed a memorandum in opposition to the various motions of defendants and intervenors. The matter was argued before the court at length on September 19, 1977. Having

fully and carefully considered the matters presented by way of written memorandum and oral argument in the light most favorable to plaintiffs, the court deems itself fully advised, and concludes that federal jurisdiction is properly invoked under 28 U.S.C. § 1331 and that the respective motions for summary judgment must be granted. The three claims of plaintiffs and the reasons for their failure are discussed in the order in which they were presented to the court.

1. Free Exercise of Religion

The factual backdrop of plaintiffs' First Amendment claim is developed in plaintiffs' amended complaint and memorandum in opposition to the motions for summary judgment. Essentially, it is claimed that certain geological formations in the Rainbow Bridge area have held positions of central importance in the religion of the Navajo people of the Navajo Mountain area

for at least 100 years. These shrines, which are regarded as the actual incarnate forms of Navajo gods, have performed protective and rain-giving functions for generations of Navajo singers. Ceremonies have been performed in Bridge Canyon near Rainbow Bridge, and water from the springs there has been used for other ceremonies. Plaintiffs allege that the flooding of Bridge Canyon in the vicinity of Rainbow Bridge and the greatly increased tourist traffic due to defendants' actions have resulted in the following specific infringements upon plaintiffs' First Amendment rights: the destruction of holy sites; the drowning of entities recognized as gods by the plaintiffs; prevention of plaintiffs from performing religious ceremonies; desecration of holy sites, especially abodes of gods of the plaintiffs, by tourists; and, by virtue of all of this, injury to the efficacy of plaintiffs' religious prayers,

and entreaties to their remaining gods. Plaintiffs stress that the result of this sacrilege has been, and will continue to be, severe emotional and spiritual distress for plaintiffs and Navajo people generally, all of which is violative of plaintiffs' rights to the free exercise of their religious beliefs and practices. Plaintiffs request this court to order defendants to take appropriate steps to operate Glen Canyon Dam and Reservoir in such a manner that the important religious and cultural interests of plaintiffs will not be harmed or degraded, and to issue rules and regulations to prevent further destruction and desecration of the Rainbow Bridge area by tourists.

[1] The First Amendment claims of plaintiffs constitute a unique challenge to the projects and actions of defendants and present to this court some rather novel questions of law. Nevertheless, it is the

opinion of the court that plaintiffs' free exercise of religion claims must fail on two alternative grounds.

First, as defendants have pointed out, plaintiffs do not allege nor do they have any property interest in the Rainbow Bridge National Monument. It is undisputed that even though the various uses of the area have fluctuated over the years and the monument area is within the present boundaries of the Navajo Indian Reservation, the 160-acre monument has never actually been a part of the Navajo Reservation. The monument was created by Presidential Proclamation on May 30, 1910, by President William H. Taft in accordance with authority conferred upon him by the Act of June 8, 1906, 16 U.S.C. § 431. Since that time, none of the flucuations of uses of the land purported to affect the monument, and the site has been held in federal ownership as a National Monument. It is part of the National Park System adminis-

tered by the National Park Service. Any aboriginal proprietary interest that the Navajos may have held in this land would have been extinguished by the entry of the white man in earlier years. See Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 339, 65 S.Ct. 690, 89 L.Ed. 985 (1945). Because plaintiffs have no property interest in the land that is the subject of this action, defendants argue that plaintiffs' First Amendment claim "... does not come within a country mile of any cognizable legal theory upon which relief can be granted." The court feels that the lack of a property interest is determinative of the First Amendment question and agrees with defendants that plaintiffs have no cognizable claim under the circumstances presented.

Despite the numerous cases presented to the court, all of which stand for valid general First Amendment principles, the

parties concede that there are no cases directly in point and that the case most analogous to the present one is Pillar of Fire v. Denver Urban Renewal Authority, 181 Colo. 411, 509 P.2d 1250 (1973). There, the Denver Urban Renewal Authority filed a petition to condemn the first permanent church building of the Pillar of Fire Church which was claimed to have great historical and religious significance. The Colorado Supreme Court thoroughly considered the First Amendment issues, directed the application of the balancing of interests test, and remanded the case for an evidentiary hearing. [On remand it was held that the city could condemn and acquire the church. Denver Urban Renewal Authority v. Pillar of Fire, 552 P.2d 23 (Colo. 1976).] The salient point for the present purposes, however, is that even in this most relevant case the property in dispute was owned by the individuals and organization which sought its pro-

tection rather than by a third person. Thus, the case is inapposite here.

To hold that a person may assert First Amendment rights to the disruption of the property rights of others, even if the other person is a government, could and likely would lead to unauthorized and very troublesome results. An example suggested by defendants Utah and the Central Utah Water Conservancy District is exaggerated but instructive and illustrative of the problem presented by plaintiffs' claims: A person might sincerely believe that he or a predecessor encountered a profound religious experience in the environs of what is now the Lincoln Memorial in Washington, D.C., and that experience might cause him to believe that the Lincoln Memorial is therefore a sacred religious shrine to him. That person, however, could hardly expect to call upon the courts to enjoin all other visitors from entering the Lincoln Memorial in order

to protect his constitutional right to religious freedom. The weakness in plaintiffs' claim is apparent. Thus, even assuming that all of the assertions as to the actuality and sincerity of plaintiffs' beliefs are true,*/ the court finds that the assertions do not give rise to a cognizable First Amendment claim under the circumstances of the instant case.

[2] Second, even if plaintiffs' claims were cognizable First Amendment claims, the

*/ On July 18, 1977, plaintiffs filed an affidavit and lengthy monograph of Dr. Karl W. Luckert, a purported expert in the field of Navajo culture and belief, concerning the history and nature of plaintiffs' religious beliefs. On September 2, 1977, defendant United States filed a motion to strike the affidavit and monograph on the grounds that the documents fail to comply with Rule 56(d), Federal Rules of Civil Procedure, in that the documents would not be admissible in evidence. Plaintiffs filed a response to this motion on September 19, 1977. For the purposes of this order only and without ruling on the merits of the motion to strike, the court accepts as established and true all of the facts and conclusions in the affidavit and monograph of Dr. Luckert. And in light of the granting of the motions for summary judgment of defendants, the motion to strike is rendered moot.

court concludes that under the United States Supreme Court's balancing of interests test the interests of defendants would clearly outweight the interests of plaintiffs. Both plaintiffs and defendants agree that the balancing of interests test is applicable in the instant action and rely upon the case of Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). In Yoder, members of the Amish faith successfully claimed that the state's compulsory education laws violated their right to the free exercise of their religion. The Supreme Court made it clear that its balancing analysis requires the following once a burden on the free exercise of religion is demonstrated:

> ... it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.

406 U.S. at 214, 92 S.Ct. at 1532. Thus,

a balancing analysis requires inquiry into the following three areas: first, the existence of a bona fide and sincere religious claim; second, the nature of the claimed religious interests; and third, the nature of the state interests.

In Yoder the Supreme Court held that the Amish claim qualified for protection under the Constitution because,

> ... the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. [Emphasis added]

406 U.S. at 216, 92 S.Ct. at 1533. The present plaintiffs have gone to great lengths to construct a cognizable action out of their claim of First Amendment religious infringement. Again, however, even assuming that all of the assertions as to the existence of plaintiffs' beliefs are true, it is apparent that these interests

do not constitute "deep religious conviction[s], shared by an organized group and intimately related to daily living."

Far short of this, pleading and discovery documents filed in this case indicate, among other things, that the medicine men who allegedly conduct the religious rites involving Rainbow Bridge and the surrounding areas are not recognized by the Navajo Nation as such. Also, the training of these medicine men has not been tribally organized or carried out, and took place years ago. The individually-named plaintiffs have attended a combined total of nine religious ceremonies within the boundaries of Rainbow Bridge Monument since 1965 (question 5(c), at p.7) and the same plaintiffs had attended religious ceremonies within the boundaries of Rainbow Bridge Monument only infrequently prior to 1965 (question 5(d), at p.8). None of the individually-named plaintiffs answering the

interrogatories could identify times at which other ceremonies were held or how many individuals attended (question 5(i)(1), at p.9). The eight individually-named plaintiffs had visited the monument a combined total of eleven times since 1965, and such visits were infrequent. Taking the information supplied by the plaintiffs as true, there is nothing to indicate that at the present time the Rainbow Bridge National Monument and its environs has anything approaching deep, religious significance to any organized group, or has in recent decades been intimately related to the daily living of any group or individual. Rather, the record supplied by the plaintiffs is to the contrary.

As to the nature of plaintiffs' religious interest, two factors considered by the Court in Yoder with respect to the nature of the religious interest were the relationship of the religious practice in

question to the Amish way of life and the history of consistency of the practice as an indication of the sincerity of the practitioners. The Navajo plaintiffs claim that their religious interest involves the use of Rainbow Bridge and its surrounding areas for religious ceremonies. Plaintiffs claim that the earlier cited infringements of their First Amendment rights result from defendants' permitting Lake Powell reservoir to fill to a level at which reservoir waters enter into Rainbow Bridge National Monument, flood Bridge Canyon, and allow tourist access to the monument. Plaintiffs fail, however, to demonstrate in any manner a vital relationship of the practices in question with the Navajo way of life or a "history of consistency" which would support their allegation of religious use of Rainbow Bridge in recent times.

In an attempt to explain the absence of religious ceremonies at Rainbow Bridge in

recent times, plaintiffs state in their memorandum that the "Navajo ceremonies ... are not periodic ceremonies ... [but] are performed when needed, and requested by an individual or family." This statement of counsel fails to carry the burden imposed by Yoder of demonstrating a religious interest sufficient to carry the day here. Plaintiffs' answers to interrogatories indicate that few, if any, ceremonies have been conducted since 1965, even though the waters of Lake Powell did not enter the monument until 1971. In sum, the alleged interests of plaintiffs have not been established.

The nature of the defendants' interest, on the other hand, lies in the continued operation of Glen Canyon Dam and the Lake Powell Reservoir consistent with current statutory and regulatory authority. This interest is fully described in the opinion of the Court of Appeals for the Tenth Cir-

cuit in Friends of the Earth v. Armstrong, 485 F.2d 1, 4-6 (10th Cir. 1973). Basically, the interest concerns water storage, power generation, state's rights, international treaty rights, the public's proprietary rights and the benefits in water distribution and use which were to be returned to the Indians, and the government's public trust responsibility. With regard to water and power development, the Court of Appeals stated as follows at 485 F.2d 6:

> From the above description of the legislation, it is apparent that Lake Powell is an important element or link in the Colorado River water and power development. It cannot be considered alone as all the existing projects in the Upper Basin, and the planned ones, are interrelated and interdependent. The projects have different purposes and functions, but are dependent on Lake Powell to provide basic storage necessary to fulfill the delivery requirements to the downstream states and Mexico, especially in dry years. If these requirements can be so met by use of this storage, the upper states can develop the water allocated to them for irrigation and other projects. If this storage is

> reduced by a limitation on the level of Lake Powell, some projects built, and some authorized, are at least impaired. This interrelation created by the comprehensive plan for development is rather delicate and can be disturbed if the capacity of by far the largest storage or regulating unit is reduced significantly. The total development plan was given extensive consideration by water experts and by Congress. See 84th Cong. 1st Sess. (1955), S.Report 128, and 84th Cong. 2nd Sess. (1956), House Report 1087. The repayment schedules and power revenues were also fully integrated into the plan. See 2 U.S. Code Cong. & Admin. News, 84th Cong. 2d Sess. (1956), pp. 2352-59.

Furthermore, the Court of Appeals stated the following with respect to the specific question of power generation, at 11:

> In conclusion on the argument that Glen Canyon Dam should be operated at less than capacity, we again refer to the portion of this opinion which considers the elimination by Congress of provision for protective works for Rainbow Bridge, and to the termination by Congress, as to Rainbow Bridge, of the application of the general wording in section 3 of the Storage Act. This left the project as planned at the time Congress approved it, and this was to the full extent of its design capacity as now constructed in all

> respects. The officials of the Bureau of Reclamation who are charged with the operation of Glen Canyon Dam and Lake Mead have so operated the Dams, and this is correct. There was included a specific admonition by Congress to them that the power generation facilities be operated at their most productive rate (43 U.S.C. § 620f).

It is clear that the state interests in the operation of the dam and reservoir in the manner prescribed by statute and regulation are weighty and not overcome by the relatively weak showing made by plaintiffs.

2. Section 1 of the Colorado River Storage Project Act

Section 1 of the Colorado River Storage Project Act, 43 U.S.C. § 620, ends with the proviso: "That, as part of the Glen Canyon Unit the Secretary of the Interior shall take adequate measures to preclude impairment of the Rainbow Bridge National Monument." In Friends of the Earth v. Armstrong, 485 F.2d 1 (10th Cir. 1973), cert. denied, 414 U.S. 1171, 94 S.Ct. 933, 39 L.Ed.2d 120

(1974), the United States Court of Appeals for the Tenth Circuit held, after extensive litigation, that action taken by Congress after the passage of the Storage Act demonstrated that the portion of section 1 that refers to Rainbow Bridge had been repealed. Nevertheless, plaintiffs, with an apparent erroneous concept of what is required of them as advocates, strongly contend that section 1 has not, in fact, been repealed. Plaintiffs quote language from Friends of the Earth stating that the case was "not really a situation of repeal by implication... but more a reversal of a previous position." 485 F.2d at 9.

[3] In so arguing, however, plaintiffs quote the language completely out of context and ignore the clear holding of the case. In Friends of the Earth, the court reviewed at length the various statutes and circumstances that demonstrated that

section 1 had been repealed by subsequent enactments. To put the language quoted by plaintiffs back in context, the court concluded as follows:

> This is thus not really a situation of repeal by implication... but more a reversal of a previous position after considering it fully in the public hearings and after the members apparently came to the conclusion that the protective works would be more detrimental than the presence of water in the Monument. ...This "repeal," if it should be called that, thus was straightforward, direct, and after hearings on the subject.

485 F.2d at 9 (emphasis added). In view of this precise holding, it is difficult to see how plaintiffs can seriously assert that section 1 can be resurrected and construed in any manner to aid them in this action.

3. Applicability of NEPA

Plaintiffs' third and final claim is that the operating criteria for Glen Canyon Dam and Lake Powell must be subjected to

an environmental impact study and statement under the mandate of section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C). It is plaintiffs' position that the finalization of the operating criteria, which finally determine how water in the water project is to be distributed among the upper basin reservoirs, and when and how that water is to be released to the lower basin, was a major federal action having a significant effect upon the quality of the human environment. Since the defendants have not issued an environmental impact of such actions, this court is asked to halt such further major actions with respect to the operation of the dam and reservoir pending the completion of an EIS.

In Grand Canyon Dorries, Inc. v. Walker, 500 F.2d 588 (10th Cir. 1974), plaintiffs sought injunctive relief against

the Secretary of the Interior and various other officials on grounds very similar to those urged by the present plaintiffs. Specifically, the Grand Canyon Dorries plaintiffs alleged that the continuing operation of the Glen Canyon Dam is a major federal action requiring an EIS pursuant to 42 U.S.C. § 4321 et seq. The Tenth Circuit held, however, that this issue was not properly before the court since the Department of Interior had not at that time taken action sufficient to establish the Department's position regarding whether and how NEPA should be applied to the operation of the dam. The court concluded that only when the Department "... has exercised the broad discretion conferred by the Act and the Guidelines will the issues be ripe for judicial determination." 500 F.2d at 590.

[4] In an attempt to distinguish the instant action from the Grand Canyon Dorries case, plaintiffs claim that the

record in this case shows that the issues presented in Grand Canyon Dorries are now ripe for decision because plaintiffs have requested that the Department prepare an EIS and because some work has been done by defendants toward deciding whether a formal EIS should be prepared. The court finds, however, that plaintiffs' reliance upon the dicta in the Tenth Circuit decision to the effect that parties should request that the Department consider the preparation of an EIS, and upon any efforts thus far undertaken by the Department, is misplaced. The clear import of Grand Canyon Dorries, which obviously is binding upon this court, is that the Department must assemble the relevant information and take a position of sufficient clarity and finality that it can fairly be said that judicial review of that position would be justified and meaningful. There is nothing

in the record that indicates that the Department has at this time taken a position at all, let alone one that would meet this standard. To the contrary, it appears from the memoranda and affidavits on file herein that the Department is still actively considering and formulating its position regarding the applicability of NEPA and the necessity of an EIS in the Glen Canyon situation. Thus, this court concludes, as did the Tenth Circuit in Grand Canyon Dorries, that the question of the applicability of NEPA to the ongoing operation of the Glen Canyon Dam and Reservoir is not properly before the court.

[5] The court would like to add, however, that even if the NEPA question were properly presented at this time, the court is of the opinion that an EIS would not be required in the present case for two reasons. First, it appears that the

operation of the dam and reservoir are so strictly limited by congressional and contractual constraints that defendants' actions are merely ministerial actions which do not rise to the level of major federal actions. See Sierra Club v. Morton, 400 F.Supp. 610 (N.D.Cal. 1975); Morris v. Tennessee Valley Authority, 345 F.Supp. 321 (N.D.Ala. 1972); Lee v. Resor, 348 F.Supp. 389 (M.D.Fla. 1972).

In Morris, supra, the court provides a helpful analysis of legal issues similar to those in the instant case. That case involved a dam authorized by the Tennessee Valley Authority Act of 1933 (16 U.S.C. § 831c) and completed prior to the enactment of NEPA. Plaintiffs claimed that defendants' operation of Wilson Dam caused the waters of the reservoir to rise and fall, causing refuse matter to accumulate in the sloughs adjacent to plaintiffs'

land. Plaintiffs sought relief under NEPA. The court dismissed this argument in summary fashion, stating:

> ... TVA has made no proposal for such a major action (nor has it taken any such major action) with respect to the matters involved in this case since NEPA became law on January 1, 1970. TVA has simply continued to operate its dams, including Wilson Dam, in accordance with the statutory directive contained in section 9a of the TVA Act. NEPA has no application to agency actions settled long before NEPA's enactment ... (emphasis added).

345 F.Supp. at 324.

In Sierra Club v. Morton, supra, the court reached a similar result.

> With respect to the Delta and Tracy Pumping Plants, it is convenient to distinguish the operation of these facilities up to their present maximum capacities from any future expansion of the two facilities. In regard to the former, plaintiffs vigorously assert that because total annual pumping at both structures will increase in future years to reach their present maximum capacities, these increases alone will be sufficient to require the filing of an EIS. The Court finds this assertion untenable. It is neither

> supported in logic nor by the case law. Although NEPA is applicable to further incremental major federal actions occurring subsequent to its effective date even though a project was initiated prior to that date, once a project is complete, there can be no further major action because at the time of completion, the project was capable of operating at maximum capacity and the agencies intended to operate it at full capacity. See generally Morris v. TVA, 345 F.Supp. 321, 324 (N.D. Ala. 1972). See CEQ Guidelines § 1500.13. If NEPA were construed to require application to ongoing projects which were fully completed prior to January 1, 1970, most federal agencies would become trapped in an endless web of EIS paperwork. Such an interpretation was not intended by Congress and is not supported by the case law.

400 F.Supp. at 645 (emphasis added). Similarly, NEPA was not intended by Congress to trap the continuing operation of Glen Canyon Dam and Lake Powell in an endless web of EIS paperwork once the project was completed and capable of operating at maximum capacity.

Second, the relief sought by plaintiffs is not within defendants' available alterna-

tives. The purpose behind the provisions of 42 U.S.C. §4332(2)(C) which require filing an EIA "on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" is to require that decisions of responsible officials be made after appropriate and careful consideration of environmental aspects of proposed actions. See, e.g., Movement Against Destruction v. Volpe, 361 F.Supp. 1360, 1383 (D. Md. 1973), affirmed, 500 F.2d 29 (4th Cir. 1974). And the courts have consistently interpreted NEPA to require a consideration of alternatives which are reasonable and do not demand what is not meaningfully possible. Life of the Land v. Brinegar, 485 F.2d 460 (9th Cir.), cert. denied, 414 U.S. 1052, 94 S.Ct. 558, 38 L.Ed.2d 341 (1973); I-291 Why? Association v. Burns, 372 F.Supp. 223 (D. Conn. 1974), aff'd, 517 F.2d 1077 (2nd Cir. 1975); City of Romulus v. Wayne County, 392 F.Supp.

578 (D.C. Mich. 1975).

Preparation at this time of a site-specific EIS on the operation of Glen Canyon Dam would be of no benefit to the plaintiff because there are no reasonable alternatives which would afford plaintiffs the relief they seek. See Friends of the Earth v. Armstrong, supra. Since, for reasons which have already been discussed, withdrawal of Lake Powell from the monument or the construction of protective works is no longer meaningfully possible, analysis of these alternatives would be only a "hollow exercise." See Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission, 146 U.S.App.D.C. 33, 52, 449 F.2d 1109, 1128 (1971). Wherefore,

IT IS HEREBY ORDERED that the motions for summary judgment of the respective defendants are granted and, in accordance with the above opinion, the motion to strike the affidavit and monograph of Karl W.

Luckert is moot.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

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| LAMARR BADONI, TEDDY HOLIDAY BETTY HOLIDAY, JESSIE YAZZIE BLACK, JIMMY GOODMAN, BEGAY BITSINNIE, SHONTO CHAPTER OF THE NAVAJO NATION, NAVAJO MOUNTAIN CHAPTER OF THE NAVAJO NATION, and INSCRIPTION HOUSE CHAPTER OF THE NAVAJO NATION, | ) | |
| Plaintiffs-Appellants, | ) | |
| vs. | ) | No. 78-1517 |
| R. KEITH HIGGINSON, Commissioner, Bureau of Reclamation; RONALD H. WALKER, Director, National Park Service; CECIL V. ANDRUS, Secretary of the Interior, | ) | |
| Defendants-Appellees, | ) | |
| STATE OF UTAH; CENTRAL UTAH WATER CONSERVANCY DISTRICT; COLORADO RIVER CONSERVATION DISTRICT; SOUTHWESTERN WATER CONSERVATION DISTRICT; and STATE OF COLORADO, | ) | |
| Defendants in Intervention-Appellees. | ) | |

Appeal from the United States District Court For the District of Utah
(D.C. No. C 74-275)

Before McWILLIAMS, BREITENSTEIN and LOGAN, Circuit Judges.

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LOGAN, Circuit Judge.

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This is an appeal from an order granting summary judgment, which effectively denied relief to Indian plaintiffs making constitutional and statutory claims against federal officials. We are asked to determine whether the religion clauses of the First Amendment apply to the government's management of the Rainbow Bridge National Monument and the Glen Canyon Dam and Reservoir, and whether an environmental impact statement concerning operation of the Glen Canyon Dam and Reservoir is required under the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. The trial court's order and opinion is reported at 455 F.Supp. 641 (D. Utah 1977).

The Rainbow Bridge National Monument is a 160-acre tract of land in southern

Utah, set aside by executive order for scientific and historical purposes. 36 Stat. 2703 (1910). Within this parcel is Rainbow Bridge, a great sandstone arch 309 feet high with a span of 278 feet. The Monument, which is surrounded by the Navajo Reservation, is administered by the National Park Service. Glen Canyon Dam, located on the Colorado River fifty-eight miles below the Monument, is a 710-foot high structure built pursuant to Congressional authorization. 1/ See 43 U.S.C. § 620. Glen Canyon Reservoir, known as Lake Powell, formed behind the dam after its completion in 1963. By 1970 the lake had entered the 160-acre tract of the Monument and by 1977 the water had a peak depth of 20.9 feet directly under the Bridge. If the lake fills to its maximum capacity, the water apparently will

1/ For a comprehensive description of the statutory scheme governing Glen Canyon Dam and Reservoir, see Friends of the Earth v. Armstrong, 485 F.2d 1 (10th Cir. 1973), cert. denied, 414 U.S. 1171 (1974).

be 46 feet deep under the Bridge.

Glen Canyon Dam and Lake Powell are operated by the Bureau of Reclamation under the direction of the Secretary of the Interior. 43 U.S.C. § 620. The federal lands adjacent to Lake Powell, other than the Monument, comprise the Glen Canyon National Recreation Area, see 16 U.S.C. § 460dd, and are administered by the National Park Service. See id. §§ 1, 460dd-3.

Prior to the creation of Lake Powell, Rainbow Bridge National Monument was isolated and was visited by few tourists. The lake now provides convenient access to the Monument. Boats licensed by the Commissioner of the Bureau of Reclamation and the Director of the National Park Service bring tourists to the Monument. Docking facilities have been constructed near the Bridge to serve tour boats and private boats. 2/

(Footnote 2/ on next page.)

Visitors to the Monument are subject to the regulation and control of the National Park Service. See 16 U.S.C. § 1 et seq.

The individual plaintiffs are Indians residing in the general area of Rainbow Bridge National Monument in southern Utah and are enrolled members of the Navajo Tribe. Three of these plaintiffs are recognized among their people as medicine men, "religious leaders of considerable stature among the Navajo, learned in Navajo history, mythology and culture, and practitioners of traditional rites and ceremonies of ancient origin." 455 F.Supp. at 642. Three plaintiffs are Navajo chapters, which are local organizations of the Navajo Nation, each consisting of the adult members of its respective community.

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2/ The Park Service also permitted operation of a floating marina near the Bridge. The government states, however, that the marina has been moved to a different canyon. Appellee's Br. 20 n.6.

In 1974 plaintiffs commenced this action for declaratory and injunctive relief against the Secretary of the Interior, the Commissioner of the Bureau of Reclamation and the Director of the National Park Service. 3/ In their amended complaint plaintiffs asserted two claims for relief relevant to this appeal: First, that defendants' operation of Glen Canyon Dam and Reservoir and management of Rainbow Bridge National Monument violated plaintiffs' rights under the Free Exercise Clause of the First Amendment; second, that defendants are required by 42 U.S.C. § 4332(2)(c) to provide an environmental impact statement concerning the operation of Glen

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3/ The court also granted motions of the Colorado River Water Conservation District, the Southwestern Water Conservation District, the State of Colorado, the State of Utah, and the Central Utah Water Conservancy District to intervene. The interests of these intervenors concern only the operation of Glen Canyon Dam and Reservior. In this appeal, their arguments are substantially the same as those presented by the government.

Canyon Dam and Reservoir and that the continuing operation of the Dam and Reservoir without such a statement violates 42 U.S.C. §§ 4221-35. After consideration of the pleadings, affidavits and discovery documents in the record, the trial court granted defendants' motions for summary judgment, from which this appeal was taken.

I.

In essence, plaintiffs' free exercise claim is that government action has infringed the practice of their religion in two respects: (1) by impounding water to form Lake Powell, the government has drowned some of plaintiffs' gods and denied plaintiffs access to a prayer spot sacred to them; and (2) by allowing tourists to visit Rainbow Bridge, the government has permitted desecration of the sacred nature of the site and has denied plaintiffs' right to conduct religious ceremonies at the prayer spot.

The trial court gave two reasons for

granting summary judgment against plaintiffs. First, the court ruled that plaintiffs do not have a cognizable free exercise claim because they have no property interest in the Monument. 455 F.Supp. at 644-45. In the alternative, it held that the federal government's interests in the Glen Canyon Dam and Reservoir as a major water and power project outweigh plaintiffs' religious interests in the Monument. 455 F.Supp. at 645-47. While we affirm the summary judgment in defendants' favor, our reasoning differs somewhat from that of the trial court.

At the outset, we reject the conclusion that plaintiffs' lack of property rights in the Monument is determinative. The governmental must manage its property in a manner that does not offend the Constitution. See Sequoyah v. TVA, 620 F.2d 1159, 1164 (6th Cir. 1980) (lack of property interest not conclusive, but is a factor in

weighing free exercise and competing interests). We must look to the nature of the government action and the quality of plaintiffs' positions to determine whether they have stated a free exercise claim. See Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

Analysis of a free exercise claim involves a two-step process. We first determine whether government action creates a burden on the exercise of plaintiffs' religion. "[I]t is necessary in a free exercise case to show the coercive effect of the enactment as it operates against ... the practice of [their] religion." School Dist. of Abington v. Schempp, 374 U.S. 203, 223 (1963). The practice allegedly infringed upon must be based on a system of belief that is religious, see, e.g., Wisconsin v. Yoder, 406 U.S. at 215-16; Kennedy v. Meachum, 540 F.2d 1057, 1060-61 (10th Cir. 1976), and sincerely held by the person asserting the infringement, see, e.g.,

United States v. Ballard, 322 U.S. 78 (1944). If such a burden is found, the action is violative of the Free Exercise Clause, unless the government establishes an interest of "sufficient magnitude to override the interest claiming protection under the Free Exercise Clause", Wisconsin v. Yoder, 406 U.S. at 214. "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." Id. at 215.

In reviewing a summary judgment, we view the facts and reasonable inferences drawn therefrom in the light most favorable to plaintiffs. The pertinent facts in this case are as follows. Rainbow Bridge and a nearby spring, prayer spot and cave have held positions of central importance in the religion of some Navajo people living in that area for at least 100 years. These shrines are regarded as the incarnate forms

of Navajo gods, which provide protection and rain-giving functions. For generations Navajo singers have performed ceremonies near the Bridge and water from the spring has been used for other ceremonies. Plaintiffs believe that if humans alter the earth in the area of the Bridge, plaintiffs' prayers will not be heard by the gods and their ceremonies will be ineffective to prevent evil and disease. Because of the operation of the Dam and Lake Powell, the springs and prayer spot are under water. Tourists visiting the sacred area have desecrated it by noise, litter and defacement of the Bridge itself. Because of the flooding and the presence of tourists, plaintiffs no longer hold ceremonies in the area of the Bridge.

A

With respect to the government action of impounding water in Lake Powell the stated infringement is the drowning of the Navajo gods, the increased tourist presence

attributable to the level at which the lake is kept, and the denial of access to the prayer spot now under water. We agree with the trial court that the government's interest in maintaining the capacity of Lake Powell at a level that intrudes into the Monument outweighs plaintiffs' religious interest. This Court has previously considered the importance of the Glen Canyon Dam and Reservoir as a crucial part of a multi-state water storage and power generation project. See Friends of the Earth v. Armstrong, 485 F.2d (10th Cir. 1973), cert. denied, 414 U.S. 1171 (1974). In the instant case unrebutted evidence, by affidavit, shows that the storage capacity of the lake would be cut in half if the surface level were dropped to an elevation necessary to alleviate the complained of infringements. The required reduction would significantly reduce the water available to the Upper Basin States of Colorado, New Mexico,

Utah and Wyoming from the Colorado River.

> Such a reduction of use in each of the above Upper Colorado River Basin States would among other things limit and reduce the development of water supplies within these States on either a long-term basis for irrigation purposes, for development of mineral and other natural resources, and for municipal and industrial water supplies.

Aff. of David L. Crandall, Regional Director of the Upper Colorado Region of the Bureau of Reclamation. Moreover, it is reasonable to conclude that no action other than reducing the water level would avoid the alleged infringement of plaintiffs' beliefs and practices. In these circumstances we believe the government has shown an interest of a magnitude sufficient to justify the alleged infringements. 4/

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4/ Because we agree with the trial court that the government's interest in maintaining the level of Lake Powell is compelling, we do not reach the question whether the government action involved infringes plaintiffs' free exercise of religion.

B

The second basis for plaintiffs' free exercise claims concerns management of the Monument by the National Park Service. Specifically, plaintiffs assert that tourists visiting the Monument desecrate the area by noisy conduct, littering and defacement of the Bridge and that the presence of tourists prevents plaintiffs from holding ceremonies near the Bridge.

The gravamen of plaintiffs' claim is that by permitting public access and the operation of commercial tour boats the government has burdened the practice of plaintiffs' religion. In their complaint plaintiffs seek an order requiring the government officials "to take appropriate steps to operate Glen Canyon Dam and Reservoir in such a manner that the important religious and cultural interests of Plaintiffs will not be harmed or degraded," and "to issue rules and regulations to take

adequate measures preventing further desecration and destruction of the Rainbow Bridge area by tourists, and otherwise to take adequate measures to preclude impairment of the Rainbow Bridge National Monument." [R. 543] In their brief-in-chief, plaintiffs state they "seek only some measured accommodation to their religious interest, not a wholesale bar to use of Rainbow Bridge by all others." [Appellants' Br. 8.] They suggest some specific types of relief, such as prohibiting consumption of beer at the Monument and closing the Monument on reasonable notice when religious ceremonies are to be held there. [Appellants' Br. 25.] In their reply brief, plaintiffs summarize their claim as follows: "The main thrust of appellants' claim seeks to eliminate government actions which encourage destructive visitor use of the Bridge, and to permit, on infrequent occasions, appellants or other Navajos to con-

duct religious ceremonies there in private." [Appellants' Reply Br. 3.]

Free exercise claims generally challenge government dictates which compel citizens to violate tenets of their religion; see Wisconsin v. Yoder, 406 U.S. 205 (1972) (Wisconsin's compulsory education law violated Amish free exercise of religion); Wooley v. Maynard, 430 U.S. 705 (1977) (statute requiring all motor vehicles of New Hampshire to bear the motto "Live Free or Die" violated Jehovah's Witness followers' First Amendment rights), or government action which conditions a benefit or right on renunciation of a religious practice. See McDaniel v. Paty, 435 U.S. 618, 633-34 (1978) (Tennessee provisions barring ministers from serving as delegates or legislators violated the First Amendment); Sherbert v. Verner, 374 U.S. 398 (1963) (disqualification of appellant from unemployment compensation because of refusal to work on

Saturday contrary to religious beliefs violated Free Exercise Clause).

The government here has not prohibited plaintiffs' religious exercises in the area of Rainbow Bridge; plaintiffs may enter the Monument on the same basis as other people. It is the presence of tourists at the Monument and their actions while there that give rise to plaintiffs' complaint of interference with the exercise of their religion. We are mindful of the difficulties facing plaintiffs in performing solemn religious ceremonies in an area frequented by tourists. But what plaintiffs seek in the name of the Free Exercise Clause is affirmative action by the government which implicates the Establishment Clause of the First Amendment. They seek government action to exclude others from the Monument, at least for short periods, and to control tourist behavior.

Unquestionably the government has a

strong interest in assuring public access to this natural wonder. Congress has charged the Park Service with the duty to provide "for the enjoyment of [parks and monuments] ... by such means as will leave them unimpaired for the enjoyment of future of the generations." 16 U.S.C. § 1. Toward this end, the Secretary of the Interior is empowered to

> grant privileges, leases, and permits for the use of land for the accommodation of visitors in the various parks, monuments, or other reservations provided for under section2 of this title, but for periods not exceeding thirty years; and no natural curiosities, wonders, or objects of interest shall be leased, rented, or granted to anyone on such terms as to interfere with free access to them by the public ...

16 U.S.C. § 3. The Park Service's action of allowing public access to Monument in accordance with this legislative grant provides the legal basis for plaintiffs' presence as well as the presence of the tourists.

Issuance of regulations to exclude tourists completely from the Monument for the avowed purpose of aiding plaintiffs' conduct of religious ceremonies would seem a clear violation of the Establishment Clause.

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement of inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

School Dist of Abington v. Schempp, 374 U.S. at 222. Exercise of First Amendment freedoms may not be asserted to deprive the public of its normal use of an area. Shuttlesworth v. Birmingham, 394 U.S. 147, 152 (1969); Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308, 320 (1968); Cox v. Louisiana, 379 U.S.

536, 554-55 (1965); Niemotko v. Maryland 340 U.S. 268, 271 (1951). Government action has frequently been invalidated when it has denied the exercise of First Amendment rights compatible with public use.

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it it not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Hague v. CIO, 307 U.S. 496, 515-16 (1939). We find no basis in the law for ordering the government to exclude the public from public areas to insure privacy during the

exercise of First Amendment rights.

We must also deny relief insofar as plaintiffs seek to have the government police the actions of tourists lawfully visiting the Monument. Although Congress has authorized the Park Service to regulate the conduct of tourists in order to promote and preserve the Monument, see 16 U.S.C. §§ 1, 3, we do not believe plaintiffs have a constitutional right to have tourists visiting the Bridge act "in a respectful and appreciative manner." [Appellants' Reply Br. 4.]

> The First Amendment protects one against action by the government, though even then, not in all circumstances; but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. ... We must accommodate our idiosyncracies, religious as well as secular, to the compromises necessary in communal life.

Otten v. Baltimore & O.R. Co., 205 F.2d 58, 61 (2d Cir. 1953) (Learned Hand, J.) (foot-

note omitted). Were it otherwise, the Monument would become a government-managed religious shrine.

The Park Service already has issued regulations applicable to the Monument prohibiting disorderly conduct, 36 C.F.R. § 2.7 (1979), intoxication and possession of alcoholic beverages by minors, id. § 2.16, defacement, id. § 2.20, littering, id. § 2.24, and tampering with personal property, id. § 2.29. These regulations no doubt would be justified as authorized under its charge to conserve and protect the scenery, natural and historic objects for the enjoyment of the public. See 16 U.S.C. § 1. These regulations also provide the relief plaintiffs request as to control of tourist behavior, except perhaps for a total ban on beer drinking.

What of the request stated in the appellants' reply brief for access "on infrequent occasions" to conduct religious

ceremonies in private? The government asserts that plaintiffs, in common with other members of the public, may apply for a public assembly permit to hold religious ceremonies at the Bridge. 5/ No one suggests such a permit could not be used to permit access after normal visiting hours when privacy might be assured. The courts have held permit requirements unconstitutional when they have been used to restrain First Amendment rights without narrow, objective standards. E.g., Shuttlesworth v. Birmingham, 394 U.S. 147 (1969). Cf. Chess v. Widmar, ___ F.2d ___ (8th Cir. No. 80-

5/ 36 C.F.R. § 2.21 provides in pertinent part:

> (a) Public meetings, assemblies, gatherings, demonstrations, parades and other public expressions of views are permitted within park areas on lands which are open to the general public provided a permit therefor has been issued by the Superintendent.

"Park area" is defined in the regulations as "all federally owned or controlled areas administered by the National Park Service." 36 C.F.R. § 1.2(f).

1048, Aug. 5, 1980) (use of university facilities). Our problem is that there is no allegation that any such permit was requested and denied. The pleadings, affidavits and interrogatories suggest no specific time or schedule for religious ceremonies. Indeed, plaintiffs' answers to interrogatories and the profferred affidavit of their expert Karl Luckert indicate the ceremonies are infrequent and scheduled at the request of individual Navajos when a need seems to exist.

Plaintiffs cite the Park Service's proposed guidelines for use of Grand Canyon National Park, which prohibit entry on certain sacred Indian religious sites. They also cite the American Indian Religious Freedom Act, 42 U.S.C. § 1996, which states a public policy to permit Indians access to sacred sites for worship, and perhaps to protect them from intrusion. See H.R. Rep. No. 1308, 95th Cong., 2d Sess. (1978),

reprinted in [1978] U.S. Code Cong. & Ad. News 1262, 1264. But we do not have before us the constitutionality of those laws or regulations or of any action taken by defendants in alleged violation of them. The pleadings, even as supplemented by the expanded requests in the brief and supported by the proffered evidence, afford no basis for relief.

II

Plaintiffs also seek an order under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4331 et seq, requiring the Department of Interior to draft an environmental impact statement (EIS) on the continuing operation of the Glen Canyon Dam and Reservoir. Alternatively, plaintiffs seek a remand to the district court for trial on this issue. The district court held that the issue was not ripe for judicial review because the agency had not taken a position of sufficient clarity and finality to allow meaningful judicial

review. 455 F.Supp. at 648. It also stated that if the issue were ripe for decision an EIS would not be required because operation of the dam involves merely ministerial rather than major federal actions and because no reasonable alternatives would afford relief to plaintiffs. Id. at 648-49.

The government now appears to concede the issue is ripe for judicial review, because the Bureau has decided to draft a comprehensive EIS for the entire Colorado River Basin Project. It has also determined that a site-specific EIS on the Glen Canyon unit is not necessary. [Appellees' Brief 24-26.] Thus, we must determine whether the agency's decision not to draft a site-specific EIS for the dam and reservoir is reasonable. 6/ See Wyoming Outdoor

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6/ The choice of standard of review here depends upon how the agency action is characterized. Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976), requires a showing the agency acted "arbitrarily" in choosing the site specific approach rather than requiring

Coordinating Council v. Butz, 484 F.2d 1244, 1248-49 (10th Cir. 1973).

The Colorado River Storage Project Act of 1956, 43 U.S.C. § 620 et seq., authorized Glen Canyon Dam and Reservoir along with other storage facilities and power plants. Construction began on October 15, 1956, and was completed on September 13, 1963. Six months later, water was first impounded in the project. In September 1968, Congress instructed the Secretary of Interior to promulgate criteria for the storage and release of the water from the Colorado River Project. 43 U.S.C. § 1552(a). The operational criteria were published on June 10, 1970, shortly after NEPA's effective date of January 1, 1970.

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(6/ cont.) a region-wide EIS. Arguably, that standard should apply to the instant case, which would make plaintiffs' task more difficult. For purposes of this appeal we give plaintiffs the benefit of the doubt and apply the "reasonableness" standard.

NEPA requires that federal agencies include an environmental impact statement "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The Bureau apparently agrees with plaintiffs that the continuing operation of the Colorado River Basin Project is a major federal action since it has decided to draft a comprehensive EIS on the entire project. Disagreement between plaintiffs and the Bureau arises because plaintiffs believe an additional site-specific EIS on the Glen Canyon unit is necessary.

The criteria in question apply not only to the Glen Canyon unit, but also to all the storage units of the Colorado River Project constructed and operated under three related acts. 7/ The title, "Criteria for Coordi-

7/ These acts are: the Colorado River Storage Project Act, 43 U.S.C. § 620 et seq.; the Boulder Canyon Project Act, 43 U.S.C.

nated Long-Range Operation of Colorado River Reservoirs," reflects the comprehensive scope of the criteria set by direction of Congress. See 43 U.S.C. § 1552(a). This Court has recognized the inter-related and comprehensive development of the water resource project. Friends of the Earth v. Armstrong, 485 F.2d 1 (10th Cir. 1973), cert. denied, 414 U.S. 1171 (1974).

> Lake Powell is an important element or link in the Colorado River water and power development. It cannot be considered alone as all the existing projects in the Upper Basin, and the planned ones, are interrelated and interdependent. The projects have different purposes and functions, but are dependent on Lake Powell to provide basic storage necessary to fulfill the delivery requirements to the downstream states and Mexico, especially in dry years ... This interrelation created by the comprehensive plan for development is rather delicate and can be disturbed if the capacity of by far the largest storage or regulating unit is reduced significantly.

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(7/ cont.) § 617 et seq.; and the Boulder Canyon Project Adjustment Act, 43 U.S.C. § 618 et seq.

Id. at 6. We also note that Congress expressly declared that the purpose of the Act which required criteria was the "further comprehensive development of the water resources of the Colorado River Basin." 43 U.S.C. § 1501(a).

Although a comprehensive EIS is frequently undertaken after project or site-specific EIS's have been drafted, need for a comprehensive EIS does not automatically establish need for environmental statements of narrower scope. See Kleppe v. Sierra Club, 427 U.S. 390, 410-12 (1976). We find no proposal for criteria or any other major action under NEPA which involves the Glen Canyon project singly; rather it is for the entire Colorado River Basin Project. We therefore find the agency's decision to draft a comprehensive EIS considering the environmental effects of the entire project and its related decision not to draft a site-specific EIS on the Glen Canyon unit

were reasonable. The district court correctly granted judgment against plaintiffs on this issue.

AFFIRMED.

NOVEMBER TERM - DECEMBER 9, 1980

Before The Honorable Oliver Seth, Chief Circuit Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges

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| LAMARR BADONI, TEDDY HOLIDAY BETTY HOLIDAY, JESSIE YAZZIE BLACK, JIMMY GOODMAN, BEGAY BITSINNIE, SHONTO CHAPTER OF THE NAVAJO NATION, NAVAJO MOUNTAIN CHAPTER OF THE NAVAJO NATION, and INSCRIPTION HOUSE CHAPTER OF THE NAVAJO NATION, | ) | |
| Plaintiffs-Appellants, | ) | No. 78-1517 |
| vs. | ) | (D.C. No. C 74-275 |
| R. KEITH HIGGINSON, Commissioner, Bureau of Reclamation; RONALD H. WALKER, Director, National Park Service; CECIL D. ANDRUS, Secretary of the Interior, | ) | |
| Defendants-Appellees, | ) | |
| STATE OF UTAH; CENTRAL UTAH WATER CONSERVANCY DISTRICT; COLORADO RIVER CONSERVATION DISTRICT; SOUTHWESTERN WATER CONSERVATION DISTRICT; and STATE OF COLORADO, | ) | |
| Defendants in Intervention-Appellees. | ) | |

This matter comes on for consideration

of appellants' petition for rehearing and suggestion for rehearing in banc in the captioned case. The court also has for consideration a memorandum of various Indian tribes in support of the petition, together with a motion of these tribes to appear and file the memorandum as amici curiae.

Upon consideration thereof, it is ordered by the hearing panel that the amici memorandum shall be filed as of November 24, 1980.

The petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure,

the suggestion for rehearing in banc is denied.

HOWARD K. PHILLIPS, Clerk

By:
Robert L. Hoecker
Chief Deputy Clerk